OGC 76-0054

6 January 1976

XR 75-10362

MEMORANDUM FOR: Director of Current Intelligence Coordinating Group

SUBJECT: Comments on the "Vail Package"

As I discussed with you, I do not intend to do a full critique of the "Vail package." However, you say it has been substantially improved, but nevertheless there are some very serious errors which I feel should be appropriately noted not only within the Agency but hopefully over to the White House.

1. First of all, the package should be classified. While it is true the White House is exempt under the Freedom of Information Act, nevertheless there are copies out in the various agencies and there are certainly parts that should be classified. STAT

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2. At page II-21 the suggestion is made that consideration should be given to revising the rules of the House and the Senate for appropriate disciplinary action for unauthorized disclosure of classified information. Again, apparently oblivious of the fact that there are clear-cut rules of both Houses, they are simply not enforced.

4. On page II-26 in discussing the problem of Congress publishing classified information provided by the Executive, the writer suggests a joint Executive-congressional board to assign security classifications to foreign intelligence information. Not stated, but implicit, is the idea that such a board could also decide what could be disclosed publicly. Clearly the latter is unconstitutional and the former is probably so, and in any event raises grave questions about concepts of separation of powers under the Constitution.

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5. Beginning at page IV-5 there is discussion of S.1 and the Agency's legislation proposing criminal sanction for unauthorized disclosure of intelligence sources and methods. There are discussed the provisions of S.1 which deal with disclosure of classified information. However, it has been learned that Justice probably no longer plans to push those provisions because of the controversy which has already developed within the Congress. They will merely leave existing espionage, COMINT, and restricted data statutes in effect. Further, it is stated that there is disagreement between CIA and Justice over the CIA proposal. As of 31 December 1975 the Justice Department has agreed to wording of and submission of the CIA bill to the Congress.

6. At page IV-7 it is argued that new legislation should not include the civil injunctive remedy because of its lack of effectiveness, especially since the remedy is available anyway if the employee has signed a secrecy oath. No one has ever argued that civil injunction is a panacea, but it is a most effective remedy in the appropriate circumstances. Furthermore, the Agency has urged the statutory injunction since the only case so far, i.e., the Marchetti case, is only recognized by one circuit and another circuit might not see fit to issue an injunction.

7. At page 8 of the paper entitled "Statutory Charters for Intelligence Organizations and Functions," it is stated that Congress did not envision the development of CIA as a major element in intelligence collection and it does not appear to be contemplated by existing statutes. In context the author is referring to clandestine collection, i.e., espionage, and he is wrong. The hearings on the National Security Act of 1947 thoroughly discussed espionage and the nucleus of such an organization was within the remnants of OSS (and then CIG) and was functioning and was intended to be taken over by CIA.

8. On page 1 of the paper entitled "Separation of Powers and Congressional Oversight Over Foreign Intelligence Functions," there is discussion of furnishing foreign intelligence information to the Congress. The author refers to executive privilege and cites Senate Select Committee v. Nixon, 498 F.2d 729 (D.C. Cir. 1974), as apparently the only court case dealing with withholding from Congress by the Executive. However, this case had nothing to do with classified material or foreign intelligence information, but concerned that portion of the executive privilege pertaining to the confidentiality of conversations between the President and an advisor. Furthermore, the court in that case held that the subpoenaed tapes were not essential to the Select Committee's performance of a legislative functions. (In reaching this result, the court gave some weight to the fact that the House Judiciary Committee had begun an inquiry into possible impeachment proceedings and already had copies of the tape in question.) If anything, the case means

that in the face of a claim of executive privilege Congress must demonstrate its need for the materials in question, and, of course, the Supreme Court's decision in United States v. Nixon, 418 U.S. 693 (1974), indicates that more weight may be given to matters which are military or state secrets than to the confidentiality of Presidential conversations with advisors.

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JOHN S. WARNER
General Counsel

cc: DCI
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